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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE DEE SCOTT et al.,

Defendants and Appellants.

H035845

(Santa Clara County

Super. Ct. Nos. 211269, CC801239)

Defendants Andre Dee Scott and Larry Douglas were convicted by jury trial of two counts of attempted murder (Pen. Code, §§ 187, 189, 664) and two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)). The jury also found true allegations that both defendants acted willfully, deliberately, and with premeditation in the commission of the attempted murders (Pen. Code, § 189, 664), personally used a firearm in the commission of the assaults and the attempted murders (Pen. Code, §§ 12022.5, subds. (a) & (d), 12022.53, subd. (b)), and personally and intentionally discharged a firearm in the commission of one of the attempted murders (Pen. Code, § 12022.53, subds. (b) & (c)), and that Douglas had personally and intentionally discharged a firearm in the commission of the other attempted murder. The jury also convicted Douglas of pimping (Pen. Code, § 266h) and pandering (Pen. Code, § 266i, subd. (a)(1)), and Scott of misdemeanor destroying or concealing evidence (Pen. Code, § 135). The court found true allegations that Douglas had suffered a prior serious felony strike conviction (Pen. Code, §§ 667,

subds. (a) & (b)-(i), 1170.12) and a prison prior (Pen. Code, § 667.5, subd. (b)). Scott admitted that he had suffered a prior juvenile adjudication, and the court found that the juvenile adjudication qualified both as a prior serious felony conviction under Penal Code section 667, subdivision (a) and as a strike under Penal Code sections 667, subdivisions (b) to (i) and 1170.12. Scott was committed to state prison for a life term consecutive to a determinate term of 40 years, and Douglas was committed to state prison for a life term consecutive to a determinate term of 58 years. Both sentences included consecutive terms for the two attempted murder counts.

On appeal, they contend that (1) the trial court prejudicially erred in responding to a question from the jury regarding the intent element of attempted murder, (2) the trial court prejudicially erred in failing to instruct the jury that a prosecution witness was an accomplice, (3) the prosecutor engaged in prejudicial misconduct, and (4) the trial court failed to exercise its discretion to impose concurrent terms for the attempted murder counts. In addition, Douglas contends that his pimping and pandering convictions are not supported by substantial evidence. Scott contends that it was unconstitutional to use his prior juvenile adjudication as a strike and that his juvenile adjudication did not qualify as a prior serious felony under Penal Code section 667, subdivision (a). The Attorney General concedes that Scott's juvenile adjudication did not qualify as a serious felony under Penal Code section 667, subdivision (a). We conclude that the trial court erred in its response to the jury's question about the intent element of attempted murder, but this error was not prejudicial. We find no other prejudicial errors. However, we accept the Attorney General's concession as a juvenile adjudication cannot qualify as a prior serious felony conviction under Penal Code section 667, subdivision (a).¹ We modify and affirm the judgment.

¹ Scott's determinate term included 10 years for the erroneous Penal Code section 667, subdivision (a) finding.

I. Factual Background

Muhamad Sagier² and Jason Wilson were friends who lived in a two-bedroom apartment together in San Jose. The two bedrooms in the apartment were off of a hallway, with Sagier's being the first one down the hallway and Wilson's being the second one.

On April 8, 2007, Sagier and Wilson discussed "call[ing] some girls to come over." Wilson had communicated with a woman on MySpace, and she had told him that she was a prostitute with an advertisement on Craigslist. She told him that she would "come hang out after she got off whatever -- her prostitution job or whatever." Wilson and Sagier looked at the woman's Craigslist ad and saw that it listed prices of "\$60 half-hour or \$120 an hour" for prostitution services. Sagier "had like no cash" and no means to pay a prostitute. Nevertheless, he "wanted to see what was going to happen" if they called one of these prostitutes. Wilson also had no money.

Sagier called this woman on his cell phone at about 8:00 p.m. and arranged for her to come to their apartment. An hour later, Lalonnie Torres arrived at their apartment. She "didn't look like a prostitute or anything" but "like kind of a regular girl." Torres had a "friendly conversation" with them in the living room of the apartment and played with their dog. The subject of sex never came up, and Torres left after half an hour without asking for any payment.

About an hour and a half later, either Sagier or Wilson called a second prostitute, again using Sagier's cell phone. One or both of them texted this woman that they would pay \$20 for a "blow job." Around midnight, Virginia Hildebrand arrived at their

² The spelling of Sagier's first name varies in the transcript. When he spelled it for the court reporter, it was Muhamad. However, he later told one of the defense attorneys: "It's not Mohamed. Muhanad." We adhere to the spelling that he provided to the court reporter.

apartment. Sagier invited her into their apartment, and she came in. However, she “was very like nervous, like kind of weird.” She seemed “kind of uncomfortable” and looked “scared.” Hildebrand asked: “[W]ho else is here? Who else lives in the house?” Sagier told her that it was just himself and Wilson. Hildebrand left after about 15 minutes.

Sagier went into the living room and started watching a movie; Wilson was in his bedroom. About 15 to 30 minutes after Hildebrand left, Sagier heard knocking on the front door of the apartment. He opened the door. At the door were two men in their 30’s standing side by side, close together. The shorter one had a “very unique hoodie” sweatshirt on and was wearing a white rubber glove, while the taller one was wearing a “black beanie.” The sweatshirt was “red and yellow and had like patches or little things” and “designs” on it. The man wearing the sweatshirt was Douglas. The taller one who was wearing a beanie was Scott. The two men walked into the apartment, and Scott locked the front door behind them. Douglas said, “Is there a problem?” and pulled out a black gun.

Sagier immediately ran down the hallway to his bedroom, slammed his bedroom door, jumped on the bed, and tried to escape through the window.³ Sagier thought that he had locked the door to his bedroom, but he was not certain. The door was kicked open, and Douglas and Scott appeared in the doorway. Douglas pointed a gun at Sagier and started shooting. Sagier ducked and put an arm over his face. He felt “bullets going around me,” and he was struck in the upper right thigh and fell down. After Sagier fell, he heard about four more shots. Sagier lost consciousness for about five minutes.

Wilson, who had heard the knocking at the door, opened his bedroom door and saw Sagier, with “fear in his eyes,” run into Sagier’s bedroom. Wilson closed and locked the door to his bedroom. He “heard rounds of gunfire” inside the apartment that sounded

³ It was a ground floor apartment.

to him like a large caliber automatic handgun. Wilson took up a position behind his bedroom door with his hand on the doorknob and his foot on the bottom of the door to prevent it being kicked in. Wilson felt someone trying to turn the doorknob. A few seconds later, he heard a gunshot, and a bullet came through his bedroom door about a foot above the doorknob and struck him in his left shoulder. Wilson heard another gunshot, and a second bullet came through his bedroom door at about the same height and struck him in the face and grazed his hand. Wilson screamed: “‘Oh, shit. I got shot.’” After he said that, he heard the sound of footsteps running away. Wilson never saw who had entered the apartment, but the footsteps sounded like there was more than one person.

When Sagier came to, he heard footsteps and he heard Wilson say “‘Mo, I’ve been shot.’” Both Sagier and Wilson called the police, and the police soon arrived. Three .22 caliber shell casings and five .40 caliber shell casings were found in the apartment. A .40 caliber bullet is about twice the size of a .22 caliber bullet. The .40 caliber bullets had been fired from a .40 caliber Smith & Wesson or Glock semi-automatic handgun, and the bullet fragments recovered established that the .40 caliber bullets were “‘jacketed hollow point’” bullets.⁴ Two of the .22 caliber casings and two of the .40 caliber casings were found “‘in the hallway area’” outside the door of Sagier’s bedroom. Another .22 caliber casing was found just inside Sagier’s bedroom. Another .40 caliber casing was found in front of the threshold of Sagier’s bedroom. One .40 caliber casing was found in the hallway area in front of Wilson’s bedroom. One .40 caliber casing was found in the bathroom, which was at the end of the hallway.

The police traced the phone numbers for the two prostitutes to a cell phone subscriber identified as “‘Slim Williams’” with a birthdate of May 29, 1981, and an

⁴ The defense conceded that the presence of both .22 caliber and .40 caliber casings established there had been two guns fired.

address that had previously been Douglas's home address. Douglas's birthdate is May 29, 1981, and he was known to use the name "Slim Williams." A few weeks after the shooting, the police traced Hildebrand to a Mountain View motel, where they saw her make contact with Douglas. The police saw Hildebrand leave the motel in a car with Douglas, Torres, and another female, and they stopped the car. The occupants of the car were arrested. Hildebrand had a tattoo on her back that said "Lotto" and had a dollar sign with the initials "L.D." on it. Torres had a tattoo on her breasts that said "'Larry aka Lotto.'" The other female in the car, Carla Pennix, had tattoos on her stomach of the initials "LD," the word "Lotto," and a representation of "playing cards." Douglas also goes by his initials, "L.D."

Three cell phones associated with the two prostitutes and "Slim Williams" were found on the occupants of the car in addition to three other cell phones. Douglas had three cell phones on his person. On the screen of one of the phones in Douglas's possession, it said "'Money over bitches.'" A cell phone on Torres's person had a picture of Douglas on it, and the carrying case for that phone bore the word "'Pimp.'" Torres's phone was one of those on the "Slim Williams" account.

A search of Douglas's home turned up the distinctive sweatshirt that he had been wearing at the time of the shooting, a partially used box of white latex gloves, and a cash box containing \$2,400. Gunshot residue was found on the right wrist area of the sweatshirt.

Douglas made a series of telephone calls from jail, which were tape-recorded. Shortly after his arrest, Douglas telephoned his girlfriend, Chante Surrency, who lived with him, and asked her to help dispose of evidence.⁵ Douglas also telephoned Pennix, with whom he was also romantically involved, and enlisted her help for the same purpose. Douglas asked her to "go look for" the guns in his backyard, but he used the

⁵ Surrency has a tattoo on her back that reads: "Mrs. Larry Douglas."

word “plasmas” to refer to the guns. Douglas also asked Scott, his close friend since childhood, to go to Douglas’s house “ASAP” and “dig up the TV’s that were buried in his backyard.” Douglas said that there were “[t]wo televisions” buried in his backyard. Douglas asked Scott and Pennix to work together in this endeavor. During a subsequent telephone conversation, Scott told Douglas that he had disposed of the “TV’s that were buried in the backyard.” Scott subsequently contacted Pennix to let her know that “he found what he was looking for in the backyard.” Scott gave her a heavy bag to take away. She subsequently gave the bag back to Scott. After Scott was arrested, he telephoned Corina Scott, his then-girlfriend and subsequent wife, from jail and asked her to help destroy evidence.

Sandra (or Sancia) McNulty, who has an “L.D.” tattoo on her breast, told the police that Hildebrand and Torres were prostitutes who worked for Douglas.⁶ Pennix confirmed that Douglas sometimes stayed at hotels rather than at his house “[b]ecause he was pimping girls.” She knew that these girls were engaging in prostitution and providing him with some of the proceeds from their prostitution. Pennix identified Torres and Hildebrand as two of the prostitutes who worked for Douglas. Pennix sometimes drove Torres and Hildebrand to their “dates.” Douglas would pay for the cost of the rental cars that Pennix used to provide this transportation.

Pennix told the police that she had driven Torres to Sagier and Wilson’s apartment on April 8, 2007. Between 30 minutes and an hour later, Douglas telephoned Pennix and screamed at her to go back and pick up Torres. Pennix did so. Torres told Pennix that “the guys, two guys, had tried to kidnap her, and they had taken her to some abandoned building.” Pennix took Torres to Douglas’s house. They did not go into the house. Douglas and Scott came out of the house and got into the car. Pennix drove the four of

⁶ McNulty denied such knowledge at trial, but her prior inconsistent statements were introduced by the prosecution.

them to a motel in Mountain View where Hildebrand was staying. They went up to Hildebrand's motel room. Hildebrand told them that she had received a "call for service" from "the same people" who Torres had accused of trying to kidnap her. She had reached this conclusion because the call came from the same telephone number. Douglas compared the cell phones of Torres and Hildebrand and confirmed that the two calls had come from the same number. Douglas was "a little agitated," and he said "nobody tries to take one of my bitches." He told Hildebrand to "make the date." Hildebrand called and arranged to go to Sagier and Wilson's apartment.

Pennix then drove Hildebrand, Douglas, and Scott back to the apartment building where she had taken Torres. Pennix parked the car, and Douglas told Hildebrand to "go inside and leave her phone open and call him and leave it on speaker so he could hear." Hildebrand did so. She went toward the apartment building, and the rest of them stayed in the car and listened to Douglas's phone. They could hear Hildebrand go into the apartment and ask how many people were in the house and "discussing a blow job." "[T]hey only had \$20, and she couldn't do it for \$20." Hildebrand left the apartment and returned to the car. She complained: "[C]an you believe they wanted me to do a blow job for \$20." Douglas asked her for the location of the apartment, and she provided it. Scott and Douglas got out of the car and proceeded toward the apartment. Hildebrand and Pennix remained in the car.

About "seven to ten minutes later," Pennix heard "[a] lot" of gunshots. Pennix started the car and saw Scott and Douglas "running out." Both men were wearing white latex gloves, and each of them had a gun in his hand. Scott and Douglas "jumped" into the car. Pennix was "in shock," and Hildebrand was "hysterically screaming, crying." Pennix drove them back to Douglas's house. During the drive, both men threw their gloves out of the car's windows. The two men went into Douglas's house for 15 to 20 minutes, while the women waited in the car. The two men emerged from the house, and Scott got into another car and drove away.

A couple of days after the shooting, Douglas and Pennix took Hildebrand and Torres to Tracy. Douglas and Pennix returned to San Jose.

II. Procedural Background

Scott was originally charged by an indictment, while Douglas was charged by an information. The two cases were joined, and an amended information was filed.⁷ The court granted requests by defendants to bifurcate the prior conviction and prison prior allegations. Defendants subsequently waived their rights to a jury trial on those allegations. The jury returned guilty verdicts on all counts. It also found all of the allegations true, except that it found that Scott had not personally and intentionally discharged a firearm in the commission of the attempted murder of Wilson.

The court found true the allegations that Douglas had suffered a strike prior, which was also a serious felony prior, and a prison prior. Scott admitted that he had suffered the prior juvenile adjudication but not that it constituted a strike. The court found that the adjudication did constitute a strike and also was a prior serious felony under Penal Code section 667, subdivision (a).

The court sentenced Douglas to state prison to serve an indeterminate life term consecutive to a determinate term of 58 years. He received consecutive terms for the two attempted murder counts. The court denied Scott's motion to strike the strike prior finding under Penal Code section 1385. Scott was committed to state prison to serve an indeterminate term of life consecutive to a determinate term of 40 years. Ten years of his sentence arose from the Penal Code section 667, subdivision (a) serious felony

⁷ A second amended information was filed after jury deliberations began, but it made no substantive changes. The original information had alleged that Douglas had personally inflicted great bodily injury in the commission of the attempted murders, but the amended informations did not contain these allegations. (Pen. Code, §§ 12022.53, subd. (d), 12022.7.)

enhancements. His sentence included consecutive terms for the two attempted murder counts. Both Scott and Douglas timely filed notices of appeal.

III. Discussion

A. Response To Jury Question

Defendants argue that the trial court prejudicially erred in responding to a jury question regarding the intent element of attempted murder.

1. Background

The trial court instructed the jury on the attempted murder counts as follows. “To prove that the defendants are guilty of attempted murder, the People must prove that: [¶] One. The defendant took at least one direct but ineffective step towards killing another person. [¶] And two. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. [¶] A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.”⁸

⁸ The court also instructed the jury on the accompanying premeditation allegations, which alleged that defendants had committed the attempted murders “willfully and with deliberation and premeditation.” “A defendant acted willfully if he intended to kill when he acted. [¶] A defendant deliberated if he carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. [¶] A defendant premeditated if he decided to kill before acting. The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. [¶] A

Both defendants' trial counsel argued to the jury that the shooters had lacked the intent to kill because the shots had not been aimed to kill but merely to injure. The prosecutor responded by arguing that, if defendants had not intended to kill, they would have called 911 after they realized that they had wounded Sagier and Wilson. "These guys didn't call 9-1-1. They went running out of that apartment. *Because they didn't care.* I mean, for all they knew, [Wilson] could have had his face blown off behind that door, because they did shoot center mass. That's all you need to know about what they intended. [¶] If those guys had bled out and died, *do you think these guys would care?*" (Italics added.)

Jury deliberations began on the afternoon of February 26, 2010. The jury deliberated for just 47 minutes before taking its evening recess. The jury deliberated all day on March 1, the next day of deliberations.

The jury also deliberated all day on March 2. The jury submitted inquiries that morning concerning the aiding and abetting instructions and that afternoon concerning the pandering instructions, and the court responded to those inquiries.⁹

decision to kill made rashly, impulsively or without careful consideration of the choice and its consequences is not deliberate or premeditated."

⁹ On the morning of March 2, the jury sent an inquiry to the court: "Clarify CALCRIM 400 and 401 to distinguish to the jury if someone can be found guilty based solely on CALCRIM 400 and 401?" Shortly thereafter, the jury submitted another inquiry: "Are CALCRIMs 400 and 401 applicable to counts 7 and 8 with reference to Penal Code 12022.5(a) 'personally.'" CALCRIM Nos. 400 and 401 concern aiding and abetting. The court responded that afternoon to the first inquiry: "Please re-read Calcrim Instruction Numbers 400 and 401 in light of all the other instructions that apply." And to the second inquiry: "Calcrim Instruction Numbers 400 and 401 apply to Counts 7 and 8, but do not apply to Penal Code Section 12022.5(a) 'Personal Use.'"

Later that afternoon, the jury submitted another inquiry: "Based on our review of CALCRIM 1151, can we interpret 'to be a prostitute' as 'to continue to be a prostitute' or 'to become a prostitute'?" The court responded: "Please refer to the following paragraph taken from Calcrim Instruction # 200: [¶] 'Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words

The jury returned to its deliberations on March 3. That morning, the jury submitted another inquiry: “With reference to CALCRIM 600; it states that to prove defendant guilty of attempted murder, Condition 1 (the defendant took at least one direct but ineffective step toward killing another person) is necessary but not sufficient and Condition 2 (the defendant intended to kill) is necessary but not sufficient. Sentence three of the last paragraph (a direct step indicates a definite and unambiguous intent to kill) seems to indicate that Cond 1 is necessary and sufficient by itself and determination of Cond 2 we need not do.” The court swiftly and correctly responded: “You must find both Condition 1 And Condition 2 have been proven beyond a reasonable doubt before you can find a defendant guilty of attempted murder.”

Later that afternoon, the jury sent another inquiry to the judge: “We have reached a unanimous conclusion on counts 3, 4, 7, 8, 9, and 10. [¶] We are divided as follows on the remaining counts: [¶] Counts: 1, 2, 5, and 6 [the attempted murder counts] 11-1 [¶] Count 10 [the pandering count]: 10-2 [¶] What is our next direction as a jury?” The court sent a note to the jury asking: “Can you clarify your verdict on Count 10.” The jury responded that, with respect to Count 10, it was “10 guilty 2 not guilty.”

The court thereafter spoke to the jury in open court. The court noted that the jury had said it “has arrived at a verdict on Counts 3, 4, 7, 8, 9 and 10 and you’ve also indicated that the jury is deadlocked on Counts 1, 2, 5, 6, and 10.” The foreperson confirmed that the jury was “hopelessly deadlocked” on the attempted murder and pandering counts. The foreperson also confirmed that, while there was a “possibility” that the jury “might arrive at a verdict” on the deadlocked counts, “[i]t’s not likely,” as the jury had “discussed this at long length.”

and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words or phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.’ [¶] Please re-read Calcrim instruction # 1151.”

The court then engaged the foreperson in a colloquy. “THE COURT: I will ask you another question. Mr. Foreperson, is there anything that the Court can do to assist the jury in arriving at a verdict on Counts 1, 2, 5, 6 and 10, such as, further jury instructions, reading of testimony by the court reporter, or anything else? [¶] THE FOREPERSON: It’s hard to say. There is certain verbiage in there which you have done your best to define. We have difficulty, you know, reaching a conclusion. I think you explained very well, your CalCrim and what have you. We still have great difficulty. [¶] THE COURT: So, it’s some of the wording that’s causing difficulty for the juror, perhaps? [¶] THE FOREPERSON: Yes. [¶] THE COURT: Well, if you think there’s something else that I can do to assist the jury, then I will do it. So I first have to ask you, and depending on your answer, I will ask the other jurors. So what is your opinion, do you think there’s anything further the Court can do to assist the jury in arriving at a verdict on those counts? [¶] THE FOREPERSON: Yes, I think you could. [¶] THE COURT: Do you want to go into the jury room with the other jurors and send me out another note, and I will do my best to answer your questions? [¶] THE FOREPERSON: One moment, please. [¶] (Jurors conferring with each other.) [¶] THE FOREPERSON: We basically believe that on Counts 1, 2, 3 [*sic*], 5, and 6 more discussion may be fruitless. We have a hung jury on that. Count 10 is conceivable. We could use more instructions, and perhaps reach a conclusion.” The court then instructed the jury to return to the jury room and send the court a “note” indicating what it desired.

The jury subsequently sent out two more notes that afternoon. The first one concerned the pandering count.¹⁰ The second note concerned the attempted murder counts. It read: “We, as a jury, have found a ‘careless disregard for lethal consequence’

¹⁰ It read: “We would like further legal definition and clarification between counts 9 and 10, and furthermore would like more definition of the word ‘procure’ in context to count 10.” The court responded in writing: “Procure means to persuade.”

in regards to counts 1, 2, 5, and 6. We would like to further clarify the phrase ‘intent to kill.’ Does a ‘careless disregard for lethal consequences’ constitute an ‘intent to kill?’”¹¹ The court responded in writing, at 4:20 p.m., to this note: “Please refer to Instruction Numbers 251 and 600.” The jury deliberated for half an hour more before retiring for the evening.

The next day, Douglas’s trial counsel put on the record the fact that he had objected to the court’s response to the note concerning the attempted murder counts. “[M]y suggested response was that [the answer to] the rather specific question was to say, no, the careless disregard, and use the same language they have in the question, does not constitute an intent to kill, because legally it would not, and I don’t believe the response directing them back to the CalCrim is sufficient because they already have those instructions, and despite those instructions, they still pose this question.” Douglas’s trial counsel moved for a mistrial on the ground that the jury’s note reflected that it was “disregard[ing]” the court’s instructions. Scott’s trial counsel joined in the mistrial motion and suggested that the jury’s use of the words “careless disregard for legal [*sic*] consequences” reflected that it was engaging in misconduct by “consult[ing] other sources ” and failing to follow the court’s instructions. The court denied the mistrial motion without comment. Later that day, the jury returned guilty verdicts on all counts, including the attempted murder counts, and found the premeditation allegations true.

2. Analysis

Defendants claim that the trial court’s failure to properly respond to the jury’s inquiry regarding the attempted murder counts violated Penal Code section 1138 and their rights to due process. They maintain that the trial court was obligated to respond to

¹¹ Although the parties see nothing in the arguments to suggest how the jury came up with this language, there is reason to believe that it might have been derived from the prosecutor’s argument that defendants had demonstrated they intended to kill by failing to call 911, which showed they “didn’t care” whether Sagier and Wilson died.

the jury's "careless disregard" inquiry with "a simple 'no.'" Because the jury was deadlocked on the attempted murder counts after three days of deliberations when it submitted this inquiry, and it reached a verdict not long after the court's response, defendants contend that they were prejudiced by the court's response.

Penal Code section 1138 provides: "After the jur[ors] have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." "[T]he statute imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331 [court must "help the jury understand the legal principles it is asked to apply"].)

"To perform their job properly and fairly, jurors must *understand* the legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means. The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts. A jury's request for reinstruction or clarification should alert the trial judge that the jury has focused on what it believes are the critical issues in the case. The judge must give these inquiries serious consideration. Why has the jury focused on this issue? Does it indicate the jurors by-and-large understand the applicable law or perhaps it suggests a source of confusion? If confusion is indicated, is it simply unfamiliarity with legal terms or is it more basically a misunderstanding of an important legal concept?" (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) "It is hardly preferable for a judge to merely repeat for a jury the text of an instruction it has already indicated it doesn't understand. We are convinced both jurors and the justice system will be well served in the vast majority of cases if the trial judge thoughtfully considers the jury's

inquiry, clarifies it if necessary, studies the applicable legal principles, and responds to the jury in as simple and direct a manner as possible.” (*Id.* at p. 253.)

In *People v. Beardslee* (1991) 53 Cal.3d 68 (*Beardslee*), a jury inquired about the definition of premeditation and deliberation, and the court told the jury that it would not explain any of the jury instructions. On appeal, the defendant claimed that the trial court had violated Penal Code section 1138. (*Beardslee*, at pp. 96-97.) The California Supreme Court held that the court’s response was erroneous. “The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information. . . . It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.” (*Beardslee*, at p. 97.) Although the California Supreme Court found that the trial court had erred, it concluded that the error was harmless because any ambiguity in the instructions would have favored rather than prejudiced the defendant, and it was mere “speculation” that the court’s response might have discouraged the jury from asking further questions. (*Beardslee*, at pp. 97-98.)

The Attorney General contends that the trial court did not abuse its discretion in deciding not to offer the jury any response other than a reference back to the original jury instructions. However, none of the cases relied upon by the Attorney General involved a properly instructed jury that nevertheless sent an inquiry to the court in which it proposed to use an improper legal standard. “The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.] But . . . implied malice cannot support a conviction of an *attempt* to commit murder.”

(*People v. Bland* (2002) 28 Cal.4th 313, 327.) Here, when the jury asked: “Does a ‘careless disregard for lethal consequences’ constitute an ‘intent to kill?’”, it was essentially asking if a “careless disregard” for life was sufficient to satisfy attempted murder’s “intent to kill” element. This was a question of law that the trial court was obligated to affirmatively resolve. As defendants point out, the correct answer was “No.” Because, notwithstanding the fact that the jury had already received accurate instructions on the “intent to kill” element, the jury had still come to believe that “careless disregard” might satisfy the “intent to kill” element of attempted murder, the trial court had an obligation to debunk the jury’s misapprehension of the jury instructions. Referring the jury back to instructions that it had clearly misunderstood was inadequate. We therefore conclude that the trial court erred in failing to respond “no” to the jury’s inquiry.

The next question is whether the trial court’s error was prejudicial. Defendants contend that the trial court’s error was a violation of the Sixth Amendment because it amounted to an erroneous instruction on an element of the offense. We disagree with this characterization of the trial court’s error. Although the court failed to properly respond “no” to the jury’s inquiry, it did not give any inaccurate instructions on the elements of the offense. Indeed, the trial court’s response to the jury’s inquiry was to refer the jury back to accurate instructions on every element of the offense. Hence, the trial court’s error was not a violation of the Sixth Amendment.

It follows that reversal is required only if it is reasonably probable that defendants would have attained a more favorable verdict if the court had properly responded “no” to the jury’s inquiry.¹² (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1020.) The record does

¹² The standard of review for a due process violation is not significantly different. (*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 841 [“‘reasonable likelihood’” standard of review].)

not support defendants' claim that a more favorable result was reasonably probable in the absence of the court's error.

The jury was properly instructed with CALCRIM No. 600, and the trial court referred the jury back to this correct instruction in response to its inquiry. Although CALCRIM No. 600 does not elaborate on the meaning of "intended to kill," it does not in any way suggest that "careless disregard" is the equivalent of "intended to kill." The evidence that defendants intended to kill was also very strong. Defendants kicked open the door to Sagier's room, pointed guns at a defenseless Sagier, and fired at least five shots, at least two of which were hollow point .40 caliber bullets, a particularly lethal bullet. Sagier, who was standing on his bed, ducking, with his arm over his face, was struck in his upper thigh, which, given his position, was close to his vital organs. Defendants did not flee after wounding Sagier but continued to Wilson's bedroom. Wilson was holding the doorknob when defendants tried to open the door, so they must have known that he was behind the door when one of them tried to turn the knob. Knowing this, they fired shots through the door, a foot above the doorknob, where one would expect to find the vital organs of someone who was holding the doorknob. Indeed, Wilson was struck by one bullet in the shoulder and by another in the face. The circumstances under which defendants fired the many shots they directed at Sagier and Wilson strongly supported a finding that defendants intended to kill both men.

Nor does the record suggest that the jury actually rested its verdict on a "careless disregard" theory rather than a finding that defendants intended to kill. The jury not only found defendants guilty of attempted murder under CALCRIM No. 600 but also found true allegations that defendants had acted willfully, deliberately, and with premeditation in the commission of the attempted murders. It is practically inconceivable that the jury could have concluded that defendants willfully, deliberately, and with premeditation acted with "careless disregard." Deliberation and premeditation are the very antithesis of "careless disregard."

As the evidence of intent to kill was very strong, and the jury's findings on the premeditation allegations were inconsistent with reliance on a "careless disregard" theory, the trial court's error in its response to the jury's inquiry was not prejudicial.

B. Absence of Accomplice Instruction

Defendants contend that the trial court should have instructed the jury that Pennix was an accomplice to the attempted murder and assault with a firearm counts.¹³ The trial court denied Scott's in limine request that it find Pennix to be an accomplice.¹⁴

"When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices." (*People v. Frye* (1998) 18 Cal.4th 894, 965-966, disapproved on a different point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) These principles are "(1) that the testimony of the accomplice witness is to be viewed with distrust [citation], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) "However, a conviction will not be reversed for failure to instruct on these principles if a review of the entire record reveals sufficient evidence of corroboration." (*People v. Frye, supra*, 18 Cal.4th at pp. 965-966.) "Such evidence "may be slight and entitled to little consideration when standing alone." [Citations.] . . . It is only required that the evidence "tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth." [Citation.]'" (*People v. Sanders* (1995) 11 Cal.4th 475, 535.)

¹³ Defendants do not claim that the trial court was obligated to give accomplice instructions as to any of the other counts.

¹⁴ During trial, a juror submitted a note asking: "Was Carla Pennix granted immunity from prosecution?"

Even if we assume that the trial court erred in failing to give accomplice instructions as to Pennix's testimony regarding the assault and attempted murder counts, any error was harmless. Sagier identified both defendants as the men who had assaulted him and Wilson with firearms. The distinctive sweatshirt that Douglas was wearing at the time of the shootings was found in Douglas's residence. The prosecution also presented evidence, other than Pennix's testimony, that Scott had participated in disposing of the guns used in the shootings. While Pennix's testimony about the events leading up to the shootings was relevant to defendants' intent, evidence of the actual conduct of the shootings was far more probative of defendants' intent at that time, and it easily corroborated Pennix's testimony in that respect. Pennix's testimony merely suggested the reason why defendants were upset with Wilson and Sagier. The fact that defendants used two guns, fired multiple shots, and pursued both occupants of the apartment, all of which was demonstrated by other evidence, was much stronger support for a finding that they intended to kill than was Pennix's testimony. Certainly it provided sufficient corroboration for her testimony. As the record contains sufficient evidence corroborating Pennix's testimony, any error in failing to give accomplice instructions was harmless.

C. Prosecutorial Misconduct

Defendants argue that the judgment must be reversed because the prosecutor committed prejudicial misconduct both in questioning the investigating officer and in closing argument.

1. Background

When the prosecutor was questioning the investigating officer, he tried to ask her questions aimed at showing that, when Pennix was interviewed by the police, the police previously had no knowledge of her involvement. His attempts were met with repeated objections, many of which were sustained. Eventually, a bench conference was held.

The prosecutor explained that he was trying to bolster Pennix's credibility by showing that she had inculpated herself at a point when the police had no knowledge of her involvement. The court pointed out that many of his questions sought irrelevant information about when the investigating officer had learned a particular fact and if she had been "surprised" to learn it. "It's not relevant, and you have doggedly continued along this path despite my sustaining the objections." The prosecutor expressed a lack of understanding of the court's rulings. The following colloquy then occurred.

"MR. CHEN [the prosecutor]: I don't understand. [¶] THE COURT: No, that's why you are ignoring my rulings. [¶] MR. CHEN: I'm not ignoring. [¶] THE COURT: You are absolutely in contempt of Court for ignoring my rulings. So you can continue on, if you like, and we will have a hearing later, or you can stop because that is my ruling. [¶] MR. CHEN: I was trying to ask whatever type of question gets around whatever issue. [¶] THE COURT: I just thought you didn't understand, but now that I'm explaining them to you. [¶] MR. CHEN: But I think for you to accuse me of contempt of court. [¶] THE COURT: You have just said you were ignoring my rulings. [¶] MR. CHEN: I didn't say I ignored your rulings. I said I didn't understand, and that's why I asked to approach, and now you are telling me what you are basing on, and I'm trying to convince you it is relevant. I wasn't ignoring. I've practiced before you before. I'm not that type of attorney, [to] just ignore what you are saying. I might not understand and try to figure a way around because maybe it's the way I'm phrasing it. [¶] THE COURT: I appreciate that. [¶] MR. CHEN: But that's why I was doing -- I thought maybe I should ask it a different way. That's all it was. So you are saying all the facts that she received from Pennix that day which were new to her -- [¶] THE COURT: I'm saying your line of questioning as to what this officer felt, was it surprising to her what Carla Pennix knew is not relevant. Now, if she did something based on Carla's statements, that's different. [¶] MR. CHEN: She did do something. Went back and got the records.

“THE COURT: Victor [Chen], you are kind of starting your case all over again. You are at the end now, okay? [¶] MR. CHEN: I’m trying to tie it together. And maybe I don’t practice law the same way you would like. [¶] THE COURT: There’s no certain way that I would like. [¶] MR. CHEN: I’m not trying to be difficult, Your Honor. Your Honor, I’m surprised that you would ever accuse me of contempt. [¶] THE COURT: It is my opinion that you said that you were disobeying the order because you disagreed. [¶] MR. CHEN: If I said that, that’s not what I meant. I meant that I didn’t understand why you were doing it this way. I did not say I was going to ignore it. There have been rulings I haven’t agreed with. [¶] THE COURT: Believe me, I know that. [¶] MR. CHEN: But my position whether I agree with the Court or not or a judge or not is never to purposely flaunt it or go against it. [¶] THE COURT: And I accept your statement.”

After the bench conference, the prosecutor resumed his questioning of the investigating officer, and he did not return to the objectionable line of questioning.

After the close of evidence, the court instructed the jury: “Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case but their remarks are not evidence. Their questions are not evidence.” Just before closing arguments began, the court reminded the jury “that what the attorneys say is not evidence.” “If either attorney misstates the evidence or the law, you will rely on the evidence as presented in the trial and on the law as stated by me.”

Scott’s trial counsel argued to the jury that “the idea of reasonable doubt is a very alien concept” and “[y]ou never think in terms of beyond a reasonable doubt.” He likened the reasonable doubt standard to the decision whether to take a loved one off of life support. The prosecutor responded in his closing argument. “They want you to rely on this onerous burden of proof that they call reasonable doubt and say, you know, reasonable doubt, nobody --” Douglas’s trial counsel interjected an objection. “I object to him labeling as onerous. That’s improper. That’s the law.” The court stated: “That’s his argument. The objection is overruled.” The prosecutor proceeded to argue: “There

are not two reasonable interpretations of the facts in this case. There just are not. There is one reasonable interpretation.”

The prosecutor’s closing argument also addressed defendants’ attack on Pennix’s credibility. “You know why she is my witness? Because I didn’t pick her. These two guys did back in 2007. They are the ones who were friends with her. They are the ones who entrusted her with information such as being the get-away driver. They are the ones -- they are the reasons why she is testifying in court. [¶] When you are putting the devil on trial, you don’t go to heaven for your witnesses. These guys are the reason she is testifying.” At this point, Douglas’s trial counsel objected. “Your Honor, I’m going to object if he is remotely suggesting my client is the devil. [¶] The jury should be admonished, and he needs to be cited for misconduct.” The trial court immediately responded: “It did appear he was calling them, that is, it’s a phrase he used, but your objection is sustained and the jury is admonished not to consider that for any reason.” The prosecutor then backtracked. “My implication was not to impugn these people. It’s a phrase. I will try to use that if you are trying to put someone on trial who is not a good person, the person who is most likely to be associated with them are people who are like minded. If you are going to commit a crime, you are not going to go and ask your pastor to be your get-away driver.” Defendants’ trial counsel did not object to this explanation.

2. Analysis

“Under California law, a prosecutor commits reversible misconduct if he or she makes use of ‘deceptive or reprehensible methods’ when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “so infected

the trial with unfairness as to make the resulting conviction a denial of due process.”””
(*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on a different point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Defendants make three complaints about the prosecutor’s conduct. First, they assert that he committed misconduct when he repeatedly asked questions of the investigating officer in an attempt to bolster Pennix’s testimony. These questions were all parried with sustained objections, so no inadmissible evidence came before the jury, and the trial court properly instructed the jury that questions by the attorneys were not evidence. “When a trial court sustains defense objections and admonishes the jury to disregard the comments, we assume the jury followed the admonition and that prejudice was therefore avoided.” (*People v. Bennett* (2009) 45 Cal.4th 577, 595.) The prosecutor’s failed attempts to adduce evidence could not have prejudiced defendants as the court sustained the defense objections and instructed the jury not to consider the prosecutor’s questions.

Second, defendants point to the prosecutor’s comment: “When you are putting the devil on trial, you don’t go to heaven for your witnesses.” Again, the court sustained the defense objection and admonished the jury to disregard the prosecutor’s comment, so no prejudice could have occurred. This was not such an inflammatory comment that the admonition cannot be relied upon.

Third, defendants identify as misconduct the prosecutor’s assertion that defendants “want you to rely on this *onerous burden of proof that they call reasonable doubt . . .*” (Italics added.) In this instance, the defense objection was overruled. Defendants contend that the prosecutor’s comment “mocked and trivialized” the reasonable doubt standard. Viewed in context, however, the prosecutor’s remark was a fair response to the defense argument that the reasonable doubt standard was “a very alien concept” that jurors would “never think in terms of” unless they had to decide whether to take a loved one off of life support. “A prosecutor is given wide latitude during closing argument.”

(*People v. Harrison* (2005) 35 Cal.4th 208, 244 (*Harrison*)). “When the issue ‘focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’” (*Ibid.*) It is highly unlikely that the jury construed the prosecutor’s comment as anything other than a response to the defense argument that the reasonable doubt standard was “a very alien concept.” The prosecutor did not otherwise misstate the burden or standard of proof, and the jury was accurately instructed on these concepts. We decline to find any prejudicial misconduct in this remark.¹⁵

D. Substantial Evidence Supports Pimping and Pandering Counts

Douglas asserts that his pimping conviction is not supported by substantial evidence that he was partially supported by Torres’s earnings. He claims that his pandering conviction is not supported by substantial evidence that he “procured” or “influenced” Torres to work as a prostitute.¹⁶

“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) “[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord *People v.*

¹⁵ Defendants also contend that there was cumulative prejudice from the trial court’s errors and the prosecutor’s misconduct. None of the errors in this case caused any significant prejudice to defendant either individually or cumulatively, so we reject their claim of cumulative prejudice.

¹⁶ The jury was instructed that both the pimping and pandering counts concerned Torres.

Pensinger (1991) 52 Cal.3d 1210, 1237.) “Evidence is sufficient to support a conviction only if it is substantial, that is, if it “‘reasonably inspires confidence”’ [citation], and is ‘credible and of solid value.’” (*People v. Raley* (1992) 2 Cal.4th 870, 890-891.)

Pimping is committed when a person, “knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person’s prostitution” (Pen. Code, § 266h, subd. (a).) Pandering is committed when a person “[p]rocures another person for the purpose of prostitution.” (Pen. Code, § 266i, subd. (a)(1).) “[T]he term ‘procure’ means assisting, inducing, persuading or encouraging” a person to engage in prostitution. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 812.)

Douglas had provided Torres with the cell phone that she was using to solicit prostitution clients. The cell phone found on her person when she was arrested had a picture of Douglas on it, and the carrying case for that phone bore the word “Pimp.” Torres had a tattoo on her breasts that read: “‘Larry aka Lotto.’” Douglas’s first name is Larry. McNulty told the police that Torres worked for Douglas as a prostitute. Pennix testified that Douglas “was pimping girls,” including Torres, and that these girls were providing Douglas with some of the proceeds from their prostitution. Douglas arranged for and paid for the cost of transporting Torres to and from appointments with her prostitution clients.

Douglas argues on appeal that Pennix’s testimony was “speculative at best” and therefore could not support the pimping count. We disagree. Pennix testified that she was romantically involved with Douglas, spent time with him on a daily basis, and participated in his pimping business by transporting his prostitutes to their appointments. She also spent time with Douglas and the prostitutes at the motels where they stayed. Pennix transported Torres and Hildebrand to their appointments with Wilson and Sagier on the night of the shootings. We see nothing “speculative” about Pennix’s testimony regarding her personal knowledge of Douglas’s pimping business. Her testimony that

Douglas's prostitutes, including Torres, were providing Douglas with a portion of their prostitution earnings was sufficient to support the pimping count.

With respect to the pandering count, Douglas contends that there was no evidence that he specifically intended to and did procure or influence Torres to be a prostitute. We disagree. "It is immaterial whether the female 'procured' is an innocent girl or a hardened prostitute of long experience." (*People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, disapproved on other grounds in *People v. Zambia* (2011) 51 Cal.4th 965, 981, *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2, and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11.) Douglas provided Torres with a cell phone and transportation specifically directed at facilitating her prostitution activities from which he benefitted. (*People v. Hobson* (1967) 255 Cal.App.2d 557, 561 [providing car for prostitution business was sufficient to show procurement].) He referred to her as "one of my bitches." A jury could reasonably infer that Douglas provided his "bitch[]" with a cell phone and transportation to encourage and assist her to engage in acts of prostitution with the specific intent to influence her to engage in prostitution and that he was successful in doing so.

E. Juvenile Adjudication

Although Scott challenged the validity of utilizing his prior juvenile adjudication as a strike and unsuccessfully moved to strike the strike finding under Penal Code section 1385, he did not challenge below the use of his prior juvenile adjudication as a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a).

Scott contends on appeal that his federal constitutional rights under the Sixth and Fourteenth Amendments preclude the use of his juvenile adjudication as a strike to enhance his sentence. He acknowledges that the California Supreme Court rejected this contention in *People v. Nguyen* (2009) 46 Cal.4th 1007. We need not analyze this

contention as we are bound by *Nguyen*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Scott did not challenge the use of his juvenile adjudication as the basis for enhancement of his sentence under Penal Code section 667, subdivision (a). Scott's determinate term included 10 years under Penal Code section 667, subdivision (a). We requested supplemental briefing on this issue. Penal Code section 667, subdivision (a) plainly does not apply to juvenile adjudications (*People v. West* (1984) 154 Cal.App.3d 100, 106-110), and the Attorney General concedes as much. Hence, Penal Code section 667, subdivision (a) did not authorize the trial court to enhance Scott's sentence. We will modify the judgment accordingly.

F. Imposition of Consecutive Terms

Defendants challenge the trial court's imposition of consecutive, rather than concurrent, terms for the two attempted murder counts. They claim that the trial court applied the wrong standard in deciding whether the two attempted murder offenses were "committed on the same occasion" or arose "from the same set of operative facts."

Because both defendants were sentenced under Penal Code section 1170.12, consecutive sentences were *mandatory* for the two attempted murder counts if the court found that the offenses were "not committed on the same occasion, and [did] not aris[e] from the same set of operative facts." (Pen. Code, § 1170.12, subd. (a)(6).) If consecutive sentences were *not mandatory*, the court would have discretion to impose either consecutive or concurrent terms. The criteria that the court would be required to consider in making this discretionary decision included: "The crimes involved separate acts of violence or threats of violence" and "[t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a).)

The probation reports recommended consecutive sentences for the attempted murder counts because each count “involved a separate act of violence.” At the sentencing hearing, the court selected consecutive terms and explained that it was doing so “because the acts are separate and involved separate victims in different rooms of the apartment.”

Defendants maintain, based solely on the court’s statement of reasons, that the trial court “misunderstood” and therefore failed to exercise its discretion to impose concurrent terms. They seek a remand for the court to exercise its discretion.

“The general rule is that a trial court is presumed to have been aware of and followed the applicable law. [Citations.] These general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues.’” (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.) Unlike defendants, we see nothing in the trial court’s statement of its reasons for imposing consecutive sentences to rebut the presumption that the trial court was aware that it had discretion to impose concurrent terms.

First, had the court believed that consecutive terms were mandatory, it would not have seen any need to make a statement of reasons. Thus, the fact that the trial court gave reasons for its imposition of consecutive terms is consistent with a finding that it was exercising its discretion, not imposing mandatory consecutive terms.

Second, the fact that the court’s statement of reasons explicitly tracked the criteria set forth in California Rules of Court, rule 4.425 for making this discretionary decision confirms that the court exercised its discretion. California Rules of Court, rule 4.425 identifies as an appropriate reason for imposing consecutive rather than concurrent terms that there were “separate acts of violence.” This was the reason given in the probation report to support its recommendation of consecutive terms. The trial court adopted this rationale by explicitly relying on the fact that the “acts are separate.” California Rules of Court, rule 4.425 also identifies as a lawful basis for imposing a consecutive, rather than

a concurrent, term that the acts “were committed at different times or separate places.” The trial court’s statement of reasons explicitly relied on the fact that the acts were “in different rooms of the apartment.” This record compels a conclusion that the trial court was aware of, and exercised, its discretion to impose either consecutive or concurrent terms. We reject defendants’ challenge to the court’s imposition of consecutive terms for the attempted murder counts.

IV. Disposition

The judgment as to Scott is modified to strike the Penal Code section 667, subdivision (a) enhancements. The trial court shall prepare an amended abstract of judgment and forward a certified copy of the abstract to the Department of Corrections and Rehabilitation. The modified judgment as to Scott is affirmed. The judgment as to Douglas is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Walsh, J.*

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.